McDaniel Ford Inc., *and* Local 259, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Cases 29–CA–18811 and 29–CA–18992

August 31, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 3, 2000, Administrative Law Judge Eleanor McDonald issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative Law Judge and orders that the Respondent, McDaniel Ford Inc., Hicksville, New York, its officers, agents, successors, and assigns shall make whole the employee named below by paying him the amount following his name, as well as any additional amounts of backpay that may have accrued since February 21, 1995, or which may accrue hereafter, with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholding required by Federal and state laws. The Respondent shall also remit to the trust funds the contributions which the Respondent failed to make on his behalf, plus additional amounts, if any, as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).[1]

	Net Backpay
Leo Balsam	$36,439.35
Unreimbursed medical benefits	457.47
TOTAL BACKPAY	36,896.82
	Contributions Owed
Local 259 Pension Fund	6,082.92
TOTAL CONTRIBUTIONS	6,082.92
TOTAL AMOUNT DUE	$42,979.74

[1] To the extent that an employee has made personal contributions to the funds that are accepted by the funds in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee for amounts paid, with interest, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the funds. See *Donovan & Associates*, 316 NLRB 169, 170 (1995).

Sharon Chau, Esq., for the General Counsel.

Mr. Henry Famularo, of Hicksville, New York, for the Respondent.

Seth M. Kupferberg, Esq. (Sipser, Weinstock, Harper & Dorn LLP), of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. On January 28, 1997, the National Labor Relations Board issued an Order directing the Respondent to reinstate employee Leon Balsam and make him whole for his loss of earnings and other benefits, to restore the incentive pay plan and make employees whole and to make contributions to the Local 259 Pension and Welfare Funds and make employees whole for any losses they may have suffered as a result of the Respondent's failure to make payments to the Union's Funds.[1] On August 27, 1997, the United States Court of Appeals for the Second Circuit entered a Judgment enforcing the provisions of the Board's Order. A controversy having arisen regarding the amount of moneys due under the Board's Order, the Regional Director of Region 29 issued a compliance specification and notice of hearing on November 30, 1998. After the specification was issued, the Regional Office and the Respondent resolved the issues relating to the incentive plan and the contributions to the Pension and Welfare Funds. Thus, the only issues before me involve the amount of backpay and unreimbursed medical expense due to Balsam and the amounts of Funds contributions due on his behalf.

The Respondent's answer to the specifications dated December 21, 1998, asserted that the backpay due to Balsam had been erroneously computed and denied that any backpay or benefits contributions were due. In addition, the answer alleged that Balsam had not reported all of his interim earnings and had falsified the resume, which he gave to prospective employers during the interim period. A hearing was held before me in Brooklyn, New York, on November 30, 1999.[2]

The Respondent's brief was filed on January 4, 2000. Thereafter, the General Counsel filed and served a motion to strike portions of the Respondent's brief and the Respondent filed an affirmation in opposition. The Respondent's brief contains a number of attachments. These are in the nature of documentary evidence and no reason has been advanced why they could not have been introduced at the hearing here. The Respondent has not shown that these documents amount to newly discovered evidence. I shall strike the attachments and the arguments based thereon from the Respondent's brief.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. BALSAM'S WORK LOCATION

In his decision in the underlying case, Administrative Law Judge Steven Fish found that Balsam had been hired to work

[1] 322 NLRB 956.

[2] Donald Rood, Esq., Counsel for the Respondent in the underlying case and a participant in the events discussed in the underlying Decision, did not appear at the backpay proceeding. His request for an adjournment due to his absence from New York was denied. At the hearing the Respondent was represented by Henry Famularo, the Respondent's parts and service director.

for the Respondent by Gary Mullin, the parts department manager.[3] Judge Fish found that Balsam worked primarily in the parts department, stocking parts, sweeping up the parts department, and looking for parts. On occasion, Balsam swept the rest of the shop. For 2 hours every workday, Balsam checked in customer cars and drove customers home. Judge Fish made no finding whether Balsam was employed in the parts department or in another department.

In the proceeding before me, Balsam testified that when he was reinstated by the Respondent he parked customer vehicles, he drove customers home or to the train station, and he swept up the shop. On cross-examination by the Respondent, Balsam stated that when he was first hired by the Respondent in 1995, he had worked in both the parts department and the service department.

William Pickering, the financial secretary/treasurer of Local 259, testified that he spoke to manager Famularo before Balsam was reinstated by the Respondent in 1998. They agreed that Balsam would be brought back to work as a utility employee. Pickering testified that the utility position is an entry-level job in the service department. The utility person helps to stock the shelves in the parts department, he sweeps the floors in the service department, he checks in customer cars, he drives customers to and from their homes, and he "runs out for parts." The utility employee is a part of the service department bargaining unit and is covered by the collective-bargaining agreement between the Respondent and the Union. Parts department employees are not members of the bargaining unit.

Famularo did not testify in the compliance proceeding.

The uncontradicted evidence shows that Balsam was reinstated by the Respondent as a utility employee, the entry-level position in the bargaining unit covered by the collective-bargaining agreement. Pickering's testimony establishes that the duties of the utility employee are precisely those duties performed by Balsam both before his discharge and after his reinstatement. Although Famularo is the Respondent's parts and service director, he did not offer any testimony to contradict Pickering's description of the utility employee's duties nor did he contradict Balsam's testimony about his duties while employed by the Respondent. Although the record shows that the utility employee performs some of his duties in the parts department and some of his duties in the service department, it is undisputed that the utility employee is a member of the bargaining unit. I find that Balsam was a utility employee and was a member of the bargaining unit and that he was therefore entitled to the pay and benefits specified in the collective-bargaining agreement. In addition, Balsam was entitled to medical benefits pursuant to the collective-bargaining agreement. He must therefore be compensated for medical expenses, which were unreimbursed as a result of his unlawful discharge.

II. BALSAM'S INTERIM EARNINGS

The specification shows that after he was unlawfully discharged by the Respondent, Balsam was employed during every quarter beginning with the third quarter of 1995 up to the time he was reinstated by the Respondent. After his discharge in February 1995, Balsam first went to work for Competition Imports and he stayed there until he was laid off in the fourth quarter of 1995. Right after his layoff, Balsam began work for Huntington Jeep Eagle. He was fired from that job at the end of 1995 because he got sick. Balsam next worked for Bauman Bus Corp. until the second quarter of 1996. He stated that he quit the job at Bauman Bus because they kept changing his hours and eventually he was working from 5 a.m. to 2 p.m., a schedule that he found impossible to cope with. Soon after quitting Bauman Bus, Balsam worked for Security Dodge from the third quarter of 1996 until the first quarter of 1997. Security Dodge had promised Balsam that he would receive medical benefits, but when these were not forthcoming Balsam quit to go to work at Burns Ford where he stayed until he was fired in the first quarter of 1998. Balsam testified that Burns Ford discharged him because he got sick. Soon after that, he was reinstated by the Respondent in April 1998.

The Respondent's brief argues that Balsam should not be compensated for any periods when he was not available for work because of illness. However, the record does not contain any facts from which I can calculate when Balsam was unavailable for work due to illness. Balsam's testimony that an employer fired him because he got sick is insufficient proof that Balsam was unavailable for employment so as to toll the backpay requirement. It is well established that once the General Counsel has shown the gross amounts of backpay due, "the burden is on the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." *NLRB v. Brown & Root,* 311 F.2d 447, 454 (8th Cir. 1963).[4] The Respondent has not met that burden in this instance. In view of the fact that Balsam worked during all the quarters of the backpay period after he found his first new job, it does not seem that Balsam was unavailable for work. Furthermore, Balsam was entitled to medical benefits pursuant to the collective-bargaining agreement between the Respondent and the Union. He was not obliged to stay in a job that did not provide medical benefits in order to mitigate the amount of backpay owed by the Respondent. Nor was Balsam required to stay in a job where he was unable to adjust to the shifting hours or where the duties were much more onerous and unpleasant than when he worked for the Respondent. *Churchill's Supermarkets,* 301 NLRB 722, 727 (1991). Finally, the fact that Balsam was fired from interim employment because he got sick does not relieve the Respondent of its obligation to provide backpay to Balsam. The Respondent has not shown that Balsam caused his discharge by deliberate or gross misconduct. *Basin Frozen Foods*, 320 NLRB 1072, 1076 (1996).

III. OTHER ARGUMENTS OF THE RESPONDENT

There is absolutely no evidence in the record to support the Respondent's assertions that Balsam concealed any interim earnings or that he falsified his resume so as to render himself undesirable to a prospective employer.

The Respondent's brief asserts that the Board should defer the computation of Balsam's backpay to arbitration. I note that this defense was not raised in the answer to the specification. At any rate, the notion that an arbitrator should undertake the computation of backpay due under a Board order is without merit. The matter of Balsam's backpay is not a contract dis-

[3] Balsam was hired in November 1994, and was unlawfully discharged by the Respondent on February 21, 1995. Balsam was reinstated on April 10, 1998, and discharged again on May 5, 1998. There is no allegation that this second termination was unlawful.

[4] Any uncertainties or ambiguities should be resolved in favor of the wronged party rather than the wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068, 1069 (1973).

pute. Rather, it is a question of carrying out a Board Order as enforced by the Court of Appeals.

IV. COMPUTATION OF WAGE INCREASES AND MEDICAL BENEFITS

The Respondent has not shown that the General's computation of backpay, contributions, and unreimbursed medical expenses, as amended at the hearing, is incorrect. Additionally, the General Counsel presented testimony and documentary evidence to support Balsam's interim earnings computation and his unreimbursed medical expenses. The evidence shows that Balsam is owed $36,439.35 in net backpay and $457.47 in unreimbursed medical expenses. The Local 259 Pension Fund is owed $6,082.92 in contributions on behalf of Balsam.

On these findings and conclusions of law and on the entire record, I issue the following recommended[5].

ORDER

The Respondent, McDaniel Ford, Inc., of Hicksville, New York, its officers, agents, successors and assigns, shall pay to Leon Balsam backpay of $36,439.35 minus statutory deductions, plus interest, and $457.47 for medical expenses, plus interest. The Respondent shall pay $6,082.92 plus interest to the Local 259 Pension Fund on behalf of Leon Balsam. Interest shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.